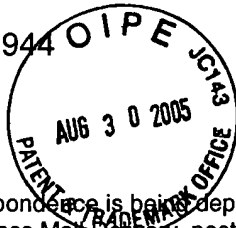


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Lynne M. Milliot

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of:

Robert E. DVORAK

Application No. 09/708,944

Confirmation No. 3032

Filed: 08 November 2000

Title: **METHOD AND APPARATUS FOR  
DISTRIBUTION OF FASHION AND  
SEASONAL GOODS**

Group Art Unit: 3623

Examiner: Romain JEANTY

**CUSTOMER NO. 22470**

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**APPEAL BRIEF**

Sir:

This Appeal Brief is filed in support of Appellants' appeal from the Final Office Action, mailed 26 January 2005, and Advisory Action, mailed 26 May 2005, in this case. A Notice of Appeal was mailed on 26 June 2005.

The appropriate fee as set forth in § 41.20 (b)(2) of \$500.00 is covered in the enclosed check. Should it be determined that additional fees are required, the Commissioner is hereby authorized to charge those fees to Deposit Account No. 50-0869 (Attorney Docket No. BLFR 1000-1).

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### **I. REAL PARTY IN INTEREST**

The real party in interest is Bluefire Systems, Inc., the assignee of record.

### **II. RELATED APPEALS AND INTERFERENCES**

There are no known appeals or interferences relating to this case.

### **III. STATUS OF CLAIMS**

Claims 1-13, 15-33, 65-85 and 112-115 are pending in this case. All have been rejected and all of the rejections are subject to this appeal.

### **IV. STATUS OF AMENDMENTS**

Withdrawn claims are cancelled with this submission, to simplify this appeal. These cancellations are the only amendments filed subsequent to the Final Office Action of January 26, 2005.

### **V. SUMMARY OF CLAIMED SUBJECT MATTER**

There are five independent claims, numbers 1, 25, 65, 76 and 80, which are addressed individually in this appeal. Groups of dependent claims addressed are 6-9; 112-115; 17 & 26; 18 & 27; 19 & 28; 20 & 29; 30-33; 83 and 84 & 85. Other dependent claims will rise or fall with the claims from which they depend or to which they are analogous.

Claim 1 presents a computer-implemented method for adjusting a *retail location-product specific selling profile* for a product. The computer-implemented method includes retrieving from a machine-readable memory at least one retail location-product specific selling *profile that includes accumulated daily or more frequent historical data* for at least one product. It further includes accessing a *retail location promotions calendar* that includes historical data that tracks promotion of the product at the location and *adjusting the historical data in the retail location-product specific selling profile* to correct for one or more promotions of the product at the retail location.

Applicant's disclosure teaches using extremely granular, adjusted data to provide much more accurate results than could be achieved in the prior art. References such as the primary Huang reference, relied upon by the Examiner, stress ways to avoid using granular data, ways to avoid the data entry and maintenance associated with

granular data and to avoid the computational expenses involved. The claims in this application use granular data such as retail location-product specific profiles with daily or more frequent historical data.

Claim 25 resembles claim 1, wherein the historical data includes a *stock on hand indicator*, further including *adjusting the* retail location-product specific selling *profile to correct for a stock out*.

(Dependent claim 16, which depends from claim 1, includes the stock on hand indicator limitation of independent claim 25. Claims 17-20 depend from claim 16. Similarly, dependent claims 21-23 include stock on hand indicators. It follows that allowing either claim 1 or 25 would render claims 16-23 also allowable.)

Claim 65 presents a computer-implemented method for generating a *projected* location specific-retail *sales profile* for a particular product, such method including accessing at least one adjusted or unadjusted location specific-retail selling profile that includes accumulated daily or more frequent historical data for at least one product; and projecting a future sales profile by adjusting the location specific-retail selling profiles to reflect sales lift from one or more promotions planned for the product.

This claim is like claim 1, but focuses on adjusting a future sales profile based on future impacts instead of adjusting historical data based on past impacts.

Claim 76 presents a computer-implemented method of revising a plurality of *retail location distribution shares* for a particular product, taking into account *planned promotions* of the particular product, the computer-implemented method including accessing a plurality of projected sales profiles, by retail location, for a particular product; *adjusting the projected sales profiles to reflect sales lift from one or more promotions planned, by retail location, for the particular product*; and *revising* a plurality of location *distribution shares* based on the adjusted projected sales profiles.

Claim 80 resembles 76, wherein the computer-implemented method includes accessing a plurality of projected daily or more frequent sales profiles, by retail location, and a plurality of retail location distribution shares, for a particular product, and *adjusting the retail location distribution shares to reflect* a weighted mix of the projected daily or more frequent sales profiles and an *actual daily or more frequent sales*.

Distribution shares in claims 76 and 80 reach a level of detail that the references do not approach.

Claims 6-9 depend from claim 1. They provide details of adjusting the historical data including [6-9] adjusting for seasonal selling effects, [7-9] by ratioing a product specific profile with an aggregate profile for non-promoted products, wherein [8] the non-promoted products are basic or non-seasonal products or wherein [9] the non-promoted products are seasonal.

Claims 112-115, added by amendment, also depend from claim 1. They provide details of grouping similar data, including [112-113] grouping product-location data for retail locations having similar sales patterns and [114-115] grouping product-location data for products having similar sales patterns. Claims [113 & 115] specify that the groups are large enough to overcome random selling noise.

Claims 17 & 26 depend from claims 1 & 25, respectively. These claims specify correcting for lack of sales attributable to failure to display stock on hand. For instance, a display shelf may be empty, even though there is stock in the back room, because too little shelf space is allocated to hold stock from one restocking shift to the next.

Claims 18 & 27 also depend from claims 1 & 25. These claims specify filling in sales for days preceding first dates of sale. For instance, inventory may reach the shelf after the promotion begins.

Claims 19 & 28 similarly depend from claims 1 & 25. These claims specify correcting for outlying sales attributable to false indications of stock on hand.

Claims 20 & 29 depend from claims 1 & 25. These claims specify filling in dates following final dates of sales, after excluding outlying sales. For instance, the location ran short of inventory before the promotion was over, but received some returns.

Claims 17-20 and 26-29 reach a level of detail that the references do not approach.

Claims 30-33 depend from claim 25 and provide detail regarding corrections for stock out conditions. The alternative corrections are [30] using average sales levels, [31] using profiled sales levels, [32] performing corrections without requiring any user selections, and [33] giving a user a choice among type of out of stock corrections.

Once again, these claims reach a level of detail that the references do not approach.

Claims 84 & 85 depend from claim 80 and provide weighting details. In claim [84], the weighted mix is calculated proportional to an elapsed period of sales; in [85], the proportions are to actual sales divided by projected sales.

#### **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

The claims were rejected under 35 U.S.C. § 103(a), over Huang et al. (U.S. Patent No. 5,953,007, hereafter “Huang”) in view of Melchione (U.S. Patent No. 5,966,695, hereafter “Melchione”), and sometimes in further view of Bakalash (U.S. Patent No. 6,434,544), and other times in further view of the Examiner’s opinion. For brevity, we present the issues as three grounds of rejection.

First, whether it was improper to reject claims 1-6, 10-11, 25, 65-66, 70, 72, 74, 76-79, and 112-115 under 35 U.S.C. § 103(a) as unpatentable over Huang in view of Melchione?

Second, whether it was improper to reject claims 7-9 under 35 U.S.C. § 103(a) as unpatentable over Huang in view of Melchione in further view of Bakalash?

Third, whether it was improper to reject claims 11-13, 16-23, 26-33, 69, 17, 73 and 75 under 35 U.S.C. § 103(a) as unpatentable over Huang in view of Melchione in further view of what the Examiner considered to be obvious to one of ordinary skill in the art, without any supporting affidavit?

By way of procedural background, the Examiner initially rejected claims under § 102(e) as anticipated by Huang and under § 103(a) as unpatentable over Huang and Bakalash or Huang and the Examiner’s opinion. Applicant successfully traversed the anticipation rejections and obviousness rejections. The Examiner declared the Applicant’s positions moot in light of new rejections including Melchione. Appellant believes and has consistently argued that the legal principles asserted were not all moot.

## VII. ARGUMENT

### A. Important and Uncontroversial Legal Principles

#### 1. Even on Appeal, the Examiner has the *Prima Facie* Burden to Present Objective Evidence of a Teaching, Suggestion or Motivation to Combine References

As productivity pressures grow, some examiners have adopted a short-cut. They attempt to satisfy the *prima facie* case requirement for objective evidence of a teaching, suggestion or motivation to combine by arguing that *it would have been obvious to a person of ordinary skill in the art to <combine the references> with the motivation to <do what is claimed>*. These words are used, verbatim, in several rejections of these claims, without any citation to passages of the references, without an examiner's affidavit and without further reasoning. This short-cut is always legally insufficient, because it does not include evidence, either citation to the references or an examiner's affidavit, and does not include technical reasoning that could be challenged or reviewed on appeal.

The importance of an evidentiary quality teaching, suggestion or motivation to combine was emphasized by the Federal Circuit several years ago. *In re Lee*, 277 F.3d 1338, 1342-44, 61 USPQ2d 1430, 1433-34 (Fed. Cir. 2002). The case has been added to the guidance in the MPEP § 2143.01 regarding obviousness analysis. The rule of *In re Lee* is that generalities will not be accepted on appeal. ***Specificity is required*** for an examiner to satisfy the *prima facie* burden for combining references; only by showing some objective evidence of teaching in the prior art or by specific identification of a principle known to one of ordinary skill can meet the legal requirement. The court reasoned, 277 F.3d at 1343-44:

As applied to the determination of patentability *vel non* when the issue is obviousness, "it is fundamental that rejections under 35 U.S.C. § 103 must be based on evidence comprehended by the language of that section." *In re Grasselli*, 713 F.2d 731, 739, 218 U.S.P.Q. (BNA) 769, 775 (Fed. Cir. 1983). ... "The factual inquiry whether to combine references must be thorough and searching." *Id.* It must be based on objective evidence of record. This precedent has been reinforced in myriad decisions, and cannot be dispensed with. [citation omitted] The need for specificity pervades this authority. See, e.g., *In re Kotzab*, 217 F.3d 1365, 1371, 55 U.S.P.Q.2D (BNA) 1313, 1317 (Fed. Cir. 2000) ("particular findings must be made as to the reason the skilled artisan, with no knowledge of the claimed invention, would have selected these components for combination in the manner claimed"); *In re Rouffet*, 149 F.3d 1350, 1359, 47



U.S.P.Q.2D (BNA) 1453, 1459 (Fed. Cir. 1998) ("even when the level of skill in the art is high, the Board must identify specifically the principle, known to one of ordinary skill, that suggests the claimed combination. In other words, the Board must explain the reasons one of ordinary skill in the art would have been motivated to select the references and to combine them to render the claimed invention obvious."); *In re Fritch*, 972 F.2d 1260, 1265, 23U.S.P.Q.2D (BNA) 1780, 1783 (Fed. Cir. 1992) (the examiner can satisfy the burden of showing obviousness of the combination "only by showing some objective teaching in the prior art or that knowledge generally available to one of ordinary skill in the art would lead that individual to combine the relevant teachings of the references"); ... In its decision on Lee's patent application, the Board rejected the need for "any specific hint or suggestion in a particular reference" to support the combination of the Nortrup and Thunderchopper references. Omission of a relevant factor required by precedent is both legal error and arbitrary agency action.

*See, Gechter v. Davidson*, 116 F.3d 1454, 1457-60, 43 U.S.P.Q.2d (BNA) 1030 (Fed. Cir. 1997) (finding arbitrary the Board's finding of anticipation because of an inadequate explanation on how the reference disclosed claim elements, vacating, and remanding). This rule applies to combining features from different sources, including combining prior art with the Examiner's opinion.

The outcome of cases decided even before *In re Lee* makes it clear that real evidence is required to prove an asserted teaching, suggestion or motivation to modify one or more references, to add features that are missing from the references. *See, e.g., In re Kotzab*, 217 F.3d 1365, 1369-70 (Fed. Cir. 2000) (rev'd finding of obviousness, as "Even when obviousness is based on a single prior art reference, there must be a showing of a suggestion or motivation to modify the teachings of that reference."); *Kolmes v. World Fibers Corp.*, 107 F.3d 1534, 1541 (Fed. Cir. 1997) (aff'd patent not invalid, as no suggestion to modify the '989 patent with regard to non-metallic fibers).

The MPEP embraces the case law, in § 2143.01, requiring that the Examiner produce objective evidence of a teaching, suggestion or motivation to combine the references, without using the claims as a roadmap:

Obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either explicitly or implicitly in the references themselves or in the knowledge generally available to one of ordinary skill in the art. "The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have

suggested to those of ordinary skill in the art." *In re Kotzab*, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1317 (Fed. Cir. 2000). See also *In re Lee*, 277 F.3d 1338, 1342-44, 61 USPQ2d 1430, 1433-34 (Fed. Cir. 2002) (discussing the importance of relying on objective evidence and making specific factual findings with respect to the motivation to combine references); *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988); *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992).

Neither the case law nor the MPEP endorse the short-cut of picking a result described in the application and arguing that *it would have been obvious to a person of ordinary skill in the art to <combine the references> with the motivation to <do what is claimed>*.

This short-cut is always legally insufficient on appeal.

## **2. The Claims of this Application Cannot be Used as a Roadmap to Combine the References**

A second problem with the short-cut is that it uses the apparent results of the claimed method as a blueprint or roadmap for combining references that lack any teaching or suggestion to combine. This approach is prohibited by the "as a whole" rule of Section 103 and is sometimes called hindsight. The Federal Circuit explained in *Ruiz v. A.B. Chance*, 357 F.3d 1270, 1275, 69 U.S.P.Q.2d (BNA) 1686 (Fed. Cir. 2004):

In making the assessment of differences, section 103 specifically requires consideration of the claimed invention "as a whole." Inventions typically are new combinations of existing principles or features. *Env'tl. Designs, Ltd. v. Union Oil Co.*, 713 F.2d 693, 698 (Fed. Cir. 1983) (noting that "virtually all [inventions] are combinations of old elements."). The "as a whole" instruction in title 35 prevents evaluation of the invention part by part. Without this important requirement, an obviousness assessment might break an invention into its component parts (A + B + C), then find a prior art reference containing A, another containing B, and another containing C, and on that basis alone declare the invention obvious. This form of hindsight reasoning, using the invention as a roadmap to find its prior art components, would discount the value of combining various existing features or principles in a new way to achieve a new result - often the very definition of invention.

Section 103 precludes this hindsight discounting of the value of new combinations by requiring assessment of the invention as a whole. This court has provided further assurance of an "as a whole" assessment of the invention under § 103 by requiring a showing that an artisan of ordinary skill in the art at the time of invention, confronted by the same problems as the inventor and with no knowledge of the claimed invention, would select the various elements from the prior art and combine them in the claimed manner. In other words, the examiner or court must show some suggestion or motivation, before the invention itself, to make the

new combination. See *In re Rouffet*, 149 F.3d 1350, 1355- 56 (Fed. Cir. 1998).

See, *Princeton Biochemicals, Inc. v. Beckman Coulter, Inc.*, 411 F.3d 1332, 1337, 75 U.S.P.Q.2d (BNA) 1051 (Fed. Cir. 2005) (reciting *Ruiz* rule; “simply identifying all of the elements in a claim in the prior art does not render a claim obvious”). The Federal Circuit has rejected the short-cut that Applicant/Appellant asserts is never legally sufficient, both as a matter of evidentiary principle (*In re Lee*) and because the reasoning used is prohibited by the statute (*Ruiz*; *Princeton Biochemicals*).

### **3. The Examiner Was Required to Submit an Evidentiary Declaration (but Chose not to Submit Evidence)**

The rejections of dependent claims 10-11, 16-23, 26-33, 69, 71, 73 and 75 begin by admitting that the references do not supply the claimed element. The Examiner resorted to his own opinion to supply the missing elements and motivation to combine. Applicant/Appellant timely requested an evidentiary affidavit or declaration that could be scrutinized and countered, if warranted. We cited MPEP § 2144.03, which advises examiners how to prepare the required evidentiary affidavit:

If the applicant traverses such an assertion the examiner should cite a reference in support of his or her position.

When a rejection is based on facts within the personal knowledge of the examiner, the data should be stated as specifically as possible, and the facts must be supported, when called for by the applicant, by an affidavit from the examiner. Such an affidavit is subject to contradiction or explanation by the affidavits of the applicant and other persons. See 37 CFR 1.104(d)(2).

The MPEP requirement for an examiner to produce an affidavit is consistent with the requirement of *In re Lee* for evidence to support combining references and the requirement for *specificity*.

### **B. Rejection of Independent Claims 1, 25, 65, 76 and 80 and Dependent Claims 16-23 Under Section 103(a) as Unpatentable Over Huang in View of Melchione was Improper**

Rejection of independent claims 1, 25, 65, 76 and 80 and dependent claims 16-23 under section 103(a) was improper for the reasons set forth below.

#### **1. Claim 1**

Claim 1 includes the limitations:

*retrieving from a machine-readable memory at least one retail location-product specific selling profile that includes accumulated corresponding to daily or more frequent historical data for at least one product;*

*accessing a retail location promotions calendar that includes historical data that tracks promotion of the product at the location; and*

*adjusting the historical data in the retail location-product specific selling profiles to correct for one or more promotions of the product at the retail location.*

These limitations are not found in Huang in view of Melchione. The rejection should be reversed because neither of the references include these limitations, so the combination cannot include what neither reference includes. And, the combination does not satisfy the legal requirements for combining references.

The Examiner backed away from his initial §102(e) position and acknowledged in the FOA that "Huang et al. fail to explicitly disclose tracking promotion of the product at a location ... accessing a retail location promotion calendar that includes historical data that tracks promotion of the product at the location."

For background, it is worth characterizing Huang. We explained in the record, and the Examiner acquiesced, that Huang discloses an agile supply management chain adapted to manufacturing, not retailing. Because demand for manufactured goods drives vendor managed replenishment (VMR) of distribution centers, Huang mentions stores in cols. 68-71. These columns do a much better job of explaining how Huang avoids using store-specific data than the Examiner-cited passages in columns 42, 55, 56 and 75. In cols. 68-71, Huang teaches away from using store-specific data three times and never suggests using store-specific data. In particular, Huang says, "Note that we do not require the data ... which represents standard deviation of demands at individual stores." Col. 69, lines 41-43. In addition, "The stock-out probability is defined as the probability of shortage in at least one of the stores [not any particular store] replenished by the DC." Col. 70, lines 50-52. Similarly, "Lead-times from each Plant to each DC and (an average) from each DC to its Stores" is an input to the vendor managed replenishment contract setup. Col. 71, lines 33-34. Teaching away from using store-specific data is not surprising for this manufacturing supply chain application, as the manufacturer will have limited access to and little interest in the store level operations of retailers. This orientation persuaded the Examiner to acknowledge some of what Huang lacks.

Notwithstanding the Examiner's position, Huang does not include *at least one retail location-product specific selling profile that includes accumulated corresponding to daily or more frequent historical data for at least one product*. As described above, in cols. 68-71, Huang teaches away from using store-specific data three times and never suggests using store-specific data. The cited passage from col. 42 says:

Inventory Profile

- 5 The inventory profile corresponds usually to the management decision of an organization, and can be used to judge the over- and under-stocking situation along the supply chain. The normal inventory profile for each product and customer combination will be captured and stored so that it can be later retrieved and compared to the current and future (projected) inventory profiles to determine the possible over- and under-stocking situations.

Because a customer of a manufacturing organization has multiple stores and may have multiple distribution centers, this passage does not teach the claimed *retail location-product specific selling profile that includes accumulated corresponding to daily or more frequent historical data for at least one product*.

Turning to the element that the Examiner acknowledges is missing from Huang, the element is also missing from Melchione. Melchione addresses a much different problem than Huang: Huang discloses agile manufacturing supply chain tools for physical inventory; Melchione discloses call center lead follow-up, sales productivity and campaign management tools, applied to intangible financial instruments with no physical inventory. Consistent with our view, the Examiner characterizes Melchione, on page 3 of the FOA, as disclosing the concept of accessing detailed sales transactions for each personal banker and viewing the sales results for the various campaigns, tracking the performance and making adjustments in the campaigns as necessary. Assigned to Citibank, Melchione discusses a three-level hierarchy (households, customers, and accounts) for use by a financial institution. See, Abstract & cols. 4-8. No manufacturing or product distribution is involved.

The Examiner relies on the following passage from col. 8, lines 38-60, to supply the "*retail location-product specific selling profile that includes accumulated daily or more frequent historical data for at least one product*" element:

The personal bankers receive access to the list of leads on the CCIS workstation, after the list is generated by the micromarketing center and communicated to the CCIS. The  
40 personal bankers then conduct sales sessions (e.g., telephone calls) with each of the customers on the list of leads. Before and during the sales sessions, the personal bankers use the CCIS to view a complete profile (in detail or in summary  
45 form) of the customer's relationship with the bank and any other demographic information about the customer contained on the central database. This allows the personal banker to speak intelligently with the customer during the sales session and thereby increase the success rate of the  
50 marketing campaign.

The branch managers and bank officers, in turn, use the CCIS as a tracking and reporting management tool to automatically capture daily sales information. The branch managers and bank officers access the detailed sales trans-  
55 actions for each personal banker using the CCIS, and view the sales results for the various campaigns to track the performance and make adjustments in the campaigns as necessary. The branch managers and bank officers also use the CCIS to reassign leads among personal bankers and/or  
60 branches to optimize the use of marketing resources.

These 23 lines do not mention a retail location-product specific selling profile for a product; instead, they extol a call center productivity tool. There is no physical inventory sales history in Melchione to combine with the manufacturing and delivery of physical inventory logic in Huang. There is no retail location-product specific selling profile because retail locations, in the sense of this claim and Huang, are meaningless to a call center environment.

Moreover, combining these references is improper. The Examiner's argument depends on the legally insufficient short-cut criticized above. The Examiner says, "It would have been obvious to a person of ordinary skill in the art to modify the disclosures of Huang et al. to include the teachings of Melchione et al. in order to maximize the profit of the financial institution." First, modifying Huang with Melchione would presumably produce an improved agile manufacturing supply chain, not a benefit to a financial institution. (Otherwise, Huang would be rendered unsuitable for its intended supply chain purpose and its principle of operation would be modified improperly, in contravention of MPEP §§ 2143.01 and 2145, paragraph (j)(4); *see also*, Barry R.A. Weinhardt, M. Reinhart, *Obviousness Under 35 U.S.C. 103 Basic Student's Manual*, pp. 24-26 (U.S. P.T.O. Office of Patent Policy Dissemination, Rev. 4 1998).)

Therefore, the Examiner's words do not accurately describe a result of combining the references.

Second, no evidence is cited of a teaching or suggestion to combine the references. We have quoted the Examiner's whole position, and it does not satisfy the evidentiary requirements of *In re Lee*.

Third, there is no detailed reasoning as to an express or implied motivation to combine. If the Examiner were forced to reason from the text of the references on which he relies, as required by *In re Lee*, through how to actually combine them, to a favorable result, we could take issue with the reasoning. But no chain of reasoning is supplied, just a conclusory statement.

Therefore, rejection of claim 1 should be reversed.

## **2. Claim 25**

Claim 25 includes the limitations:

*retrieving at least one retail location-product specific selling profile that includes accumulated daily or more frequent historical data for at least one product;*

*wherein the historical data includes a stock on hand indicator, adjusting the retail location-product specific selling profile to correct for a stock out.*

These limitations are not found in Huang, which is the only reference that the Examiner actually cites, relying parenthetically on col. 42, lines 5-10, col. 7, lines 26-30 and col. 56, lines 3-8, without any discussion beyond the parenthetical citations.

In the context of claim 1, we set forth the passage from col. 42 and established that Huang does not include *retrieving at least one retail location-product specific selling profile that includes accumulated daily or more frequent historical data for at least one product* and actually teaches away from using retail location-product specific data. Therefore, the rejection should be reversed.

This claim uses an on hand stock indicator, such as an inventory quantity or an on-hand flag, to adjust daily or more frequent historical sales records, which is useful to provide a more accurate basis for forward-looking analysis. The Examiner's reliance on col. 7, lines 26-30, is misplaced, as that passage discusses inventory nodes and headers and grouping of customers into customer groups. Reliance on col. 56, lines 3-8, is equally misplaced, as that passage discusses promotions, not on hand indicators

or out-of-stock conditions. Neither of the passages in col. 7 nor 56 meets the adjusting limitation.

For these reasons, rejection of claim 25 should be reversed.

### **3. Dependent Claims 16-23**

Claims 16-23 depend from claim 1 and further make use of on hand indicators, along the lines of claim 25. If rejection of either claim 1 or 25 is reversed, claims 16-23 should be allowable.

### **4. Claim 65**

Claim 65 is like claim 1, but focuses on adjusting a future sales profile instead of adjusting historical data, which can be used to prepare a future sales profile. Its limitations include:

*accessing at least one adjusted or unadjusted location specific-retail selling profile that includes accumulated daily or more frequent historical data for at least one reference product; and*

*projecting a future sales profile by adjusting the location specific-retail selling profile to reflect sales lift from one or more promotions planned for the product.*

These limitations are not found in Huang in view of Melchione.

The Examiner did not discuss claim 65 separately from claim 1. He did not apply either of the references or the combination to the second element of claim 65; he mentioned only adjusting historical data, not taking into account future promotions. FOA, page 3.

Rejection of claim 65 should be reversed because the Examiner has not met the *prima facie* obligation for the second element and for all of the reasons given in the discussion of claim 1 above.

### **5. Claim 76**

Claim 76 adds to the adjusting of projected sales profiles (claim 65) the element:  
*revising a plurality of location distribution shares based on the adjusted projected sales profiles*

This added element is not found in Huang in view of Melchione.

Once again, the Examiner did not discuss claim 76 separately from claim 1. He did not attempt to apply either of the references or the combination to adjusting distribution shares. FOA, page 3.



Rejection of claim 76 should be reversed because the Examiner has not met the *prima facie* obligation for the adjusting distribution shares element and for all of the reasons given in the discussion of claim 1 above.

**6. Claim 80**

Claim 80 refines adjusting of projected distribution shares (claim 76) with use of actual sales, in the following limitations:

*accessing a plurality of projected daily or more frequent sales profiles, by retail location, and a plurality of retail location distribution shares, for a particular product; and*

*adjusting the retail location distribution shares to reflect a weighted mix of the projected daily or more frequent sales profiles and an actual daily or more frequent sales*

These refinements are not found in Huang in view of Melchione.

The Examiner did not discuss claim 80 separately from claim 1. He did not attempt to apply either of the references or the combination to adjusting distribution shares or using actual sales. FOA, page 3.

Rejection of claim 80 should be reversed because the Examiner has not met the *prima facie* obligation and because combining the references was improper, as discussed in the context of claim 1 above.

For the reasons given, all of the rejections of independent claims and analogous dependent claims should be reversed.

**B. Rejection of Claims 6-9 and 112-115 Under 35 U.S.C. 103(a) was Improper**

**1. Claims 6-9**

Claims 6-9 provide details of adjusting the historical data including [6-9] adjusting for seasonal selling effects, [7-9] by ratioing a product specific profile with an aggregate profile for non-promoted products, wherein [8] the non-promoted products are basic or non-seasonal products or wherein [9] the non-promoted products are seasonal.

The Examiner did not discuss claim 6 separately from claim 1. He did not apply either of the references or the combination to adjusting retail location-product specific selling profiles to correct for seasonal selling effects. Rejection of claim 6 (and claims 7-9) should be reversed because the Examiner has not met the *prima facie* obligation and

because combining the references was improper, as discussed in the context of claim 1 above.

Claims 7-9 depend from claim 6 and include the limitations:

*[7] wherein the adjusting to correct for seasonal selling effects includes ratioing the retail location-product specific selling profile with an aggregate profile that includes historical data for non-promoted products.*

*[8] wherein the non-promoted products are non-seasonal or basic products.*

*[9] wherein the non-promoted products are seasonal products.*

The Examiner rejected these claims on FOA p. 4, as unpatentable over a three-way combination of Huang, Melchione and Bakalash.

Bakalash is an improved online analytical process (OLAP) tool. OLAP tools can be understood as super-spreadsheets connected to databases. Wikipedia explains that OLAP

is an approach to quickly provide the answer to complex analytical queries. It is part of broader business intelligence category which also includes ETL, relational reporting and data mining. The typical applications of OLAP are in business reporting for sales, marketing, management reporting, business performance management (BPM), budgeting and forecasting, financial reporting and similar areas.

Databases configured for OLAP employ a multidimensional data model, allowing for complex analytical and ad-hoc queries with a rapid execution time. Nigel Pendse has suggested that an alternative and perhaps more descriptive term to describe the concept of OLAP is Fast Analysis of Shared Multidimensional Information (FASMI).

<http://en.wikipedia.org/wiki/OLAP>, accessed August 26, 2005. The strength of OLAP tools is data aggregation. Many discussions of spreadsheets and OLAP features are superficial, aimed to entice the user to buy a more powerful tool for well-understood analyses, not to teach new kinds of analysis. Bakalash's disclosure of an improved OLAP tool follows this pattern.

The section of Bakalash on which the Examiner relies is the background section, col. 1, line 48 through col. 2 line 15, which teaches a tool to "allow knowledge workers to intuitively, quickly and flexibly manipulate operation data" in arbitrary ways, as expected for a spreadsheet or OLAP tool. But it says nothing about retail management of stores and physical inventory needs. Rejection of claims 7-9 should be reversed because Bakalash does not teach the claimed elements.

The three-way combination of Huang-Melchione-Bakalash is improper at least for the reasons given above that the Huang-Melchione combination is improper.

The Examiner adds the third Bakalash reference to the combination using the now-familiar (and legally improper) short-cut of arguing, "It would have been obvious to a person of ordinary skill in the art to modify the disclosure of Huang et al. to incorporate the ratioing teaching of Bakalash with the motivation to project sales of the product."

First, the passage cited does not describe the claimed "ratioing." Therefore, the rejections should be reversed.

Second, no evidence is cited of a teaching or suggestion to combine the references. We specifically requested an affidavit supporting the Examiner's opinion, and he decided not to produce the required evidence. We have quoted the Examiner's whole position; it does not satisfy the evidentiary requirements of *In re Lee*.

Third, there is no detailed reasoning as to an express or implied motivation to combine. If the Examiner were forced to reason from the text of the references on which he relies, as required by *In re Lee*, through how to actually combine them, to a favorable result, we could take issue with the reasoning. But no chain of reasoning is supplied, just a conclusory statement.

Therefore, rejection of claims 7-9 should be reversed.

## **2. Claims 112-115**

These claims provide details of grouping similar data, including [112-113] grouping product-location data for retail locations having similar sales patterns and [114-115] grouping product-location data for products having similar sales patterns. Claims [113 & 115] specify that the groups are large enough to overcome random selling noise. These limitations are not found in Huang in view of Melchione.

The Examiner did not discuss claims 112-115 separately from claim 1. He did not apply either of the references or the combination to the elements of claims 112-115; he made no mention of grouping granular data or of using group sizes large enough to overcome random selling noise. FOA, page 3.

Rejection of claims 112-115 should be reversed because the Examiner has not met his *prima facie* burden and for all of the reasons given in the discussion of claim 1, above.

**C. Rejection of Claims 17 & 26, 18 & 27, 19 & 28 and 20 & 29 Under 35 U.S.C. 103(a) as Unpatentable Over Huang in View of Melchione in Further View of the Examiner's Opinion was Improper**

These pairs of claims depend from claims 1 & 25, respectively. Various claims specify details of correcting for out-of-stock conditions, including logical evaluation of whether sales patterns are consistent with on hand indications. The Examiner acknowledged that Huang-Melchione does not include the claimed elements (FOA, p. 5) and relied on his own opinion of what would be obvious.

We proved above that Huang does not include *at least one retail location-product specific selling profile that includes accumulated corresponding to daily or more frequent historical data for at least one product* and actually teaches away from using store-specific data three times and never suggests using store-specific data. It should not be surprising that we assert that the Examiner's opinion cannot properly be used to elaborate on elements that are missing from Huang-Melchione.

Because the Examiner's opinion is the only thing close to evidence offered to meet the claimed elements, we specifically and timely requested an Examiner's affidavit. The Examiner decided not to tender the required evidence. The Examiner's conclusory and legally insufficient statement is brief: "As products are being sold, they have to restocked in order to maintain supply of the products. Thus it would have been obvious to a person of ordinary skill in art to include the recited features into Huang et al. in order to increase sales." This statement does not meet the Examiner's obligation to supply an affidavit and without evidence cannot meet the requirements of *In re Lee* or *Ruiz*. Therefore, the rejections should be reversed.

Below, we walk through the claim pairs for completeness.

**1. Claims 17 & 26**

Claims 17 & 26 include the limitations:

*wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand indicators for the location and correcting for lack of sales attributable to failure to display stock on hand.*

These limitations admittedly are not found in Huang-Melchione.

The Examiner's reasoning that, "As products are being sold, they have to restocked in order to maintain supply of the products," does not teach, suggest or

motivate modification of Huang's agile manufacturing supply chain application (which teaches against using store level data) or of Melchione's call center application for selling intangible financial instruments that are not restocked.

## **2. Claims 18 & 27**

Claims 18 & 27 include the limitations:

*wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand indicator for the location and filling in sales for days preceding first dates of sales for the location.*

These limitations admittedly are not found in Huang-Melchione.

The Examiner's reasoning that, "As products are being sold, they have to restocked in order to maintain supply of the products," does not teach, suggest or motivate modification of Huang's agile manufacturing supply chain application or of Melchione's call center application for intangible financial instruments. The Examiner's reasoning does not relate to the words of the claim.

## **3. Claims 19 & 28**

Claims 19 & 28 include the limitations:

*wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand indicator for the location and correcting for outlying sales at the location attributable to false indications of stock on hand.*

These limitations admittedly are not found in Huang-Melchione.

The Examiner's reasoning about maintaining a supply of products on the shelves does not teach, suggest or motivate modification of Huang's or Melchione's software applications. Again, the Examiner's reasoning does not relate to the words of claims 19 & 28.

## **4. Claims 20 & 29**

Claims 20 & 29 include the limitations:

*wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand indicator for the location and correcting for outlying sales at the location attributable to false indications of stock on hand.*

These limitations admittedly are not found in Huang-Melchione.

The Examiner's reasoning about maintaining a supply of products on the shelves does not teach, suggest or motivate modification of Huang's or Melchione's software

applications. Again, the Examiner's reasoning does not relate to the words of claims 20 & 29.

Therefore, the rejections of claim pairs 17 & 26, 18 & 27, 19 & 28 and 20 & 29 should be reversed.

**D. Rejection of Claims 30-33 Under 35 U.S.C. 103(a) was Improper**

Claims 30-33 depend from claim 25 and elaborate on corrections for stock out conditions. The alternative elaborations involve [30] using average sales levels, [31] using profiled sales levels, [32] performing corrections without requiring any user selections, and [33] giving a user a choice among type of out of stock corrections. The Examiner acknowledges that Huang-Melchione does not include the claimed elements. FOA, p. 5. These claims were not separately addressed by the Examiner – he applied the same two sentences applied to claims 16-23 and 26-29 to claims 30-33, without addressing the different limitations. As a short-cut, the Examiner opined that “it would have been obvious to a person of ordinary skill in the art to include the recited features ...” With this argument, he summarily relied on his own opinion.

We proved above that Huang does not include *at least one retail location-product specific selling profile that includes accumulated corresponding to daily or more frequent historical data for at least one product* and actually teaches away from using store-specific data. We maintain that the Examiner's opinion cannot properly be used to elaborate on elements that can not be found in Huang-Melchione – there is no foundation to use the Examiner's opinion for elaboration.

Because the Examiner's opinion is the only thing close to evidence offered to meet the claimed elements, we specifically and timely requested an Examiner's affidavit. The Examiner decided not to tender the required evidence. The Examiner's un-supplemented conclusory statement does not meet the obligation to supply an affidavit or the requirements of *In re Lee* and *Ruiz*. Therefore, the rejections should be reversed.

**E. Rejection of Claims 84 & 85 Under 35 U.S.C. 103(a) was Improper**

Claims 84 & 85 include the limitations:

*wherein the weighted mix is calculated proportional to an elapsed period of sales.*

*wherein the weighted mix is calculated proportional to actual sales divided by projected sales.*

These limitations are not found in Huang-Melchione.

As with independent claims 76 and 80, the Examiner did not discuss these claims separately from claim 1. He did not apply either of the references or the combination to details of adjusting distribution shares using actual sales. FOA, page 3.

Rejection of claims 84 & 85 should be reversed because the Examiner has not met the *prima facie* burden and because combining the references was improper, as discussed in the context of claim 1, above.

### CONCLUSION

In view of the foregoing, Applicant/Appellant asks that this honorable Board reverse the Examiner's rejections of the claims. In addition, it is submitted that all claims are now allowable, and a notice of intent to issue a patent is respectfully requested.

The Commissioner is hereby authorized to charge any fee determined to be due in connection with this communication, or credit any overpayment, to our Deposit Account No. 50-0869 (File No. BLFR 1000-1).

Respectfully submitted,



Dated: 26 August 2005

Ernest J. Beffel, Jr., Reg. No. 43,489  
Attorney for Patent Owner

HAYNES BEFFEL & WOLFELD LLP

P.O. Box 366  
751 Kelly Street  
Half Moon Bay, CA 94019  
Telephone: 650.712.0340  
Facsimile: 650.712.0263

### **CLAIMS APPENDIX**

1. (Previously presented) A computer-implemented method for adjusting a retail location-product specific selling profile for a product, the computer-implemented method including:
  - retrieving from a machine-readable memory at least one retail location-product specific selling profile that includes accumulated daily or more frequent historical data for at least one product;
  - accessing a retail location promotions calendar that includes historical data that tracks promotion of the product at the location; and
  - adjusting the historical data in the retail location-product specific selling profile to correct for one or more promotions of the product at the retail location .
2. (Original) The method of claim 1, further including storing one or more adjusted selling profiles.
3. (Previously presented) The method of claim 1, wherein the promotions calendar identifies advertising of the product.
4. (Previously presented) The method of claim 1, wherein the promotions calendar identifies a preferential display of the product.
5. (Previously presented) The method of claim 1, wherein the promotions calendar identifies a price reduction applied to the product.
6. (Previously presented) The method of claim 1, further including adjusting the historical data in the retail location-product specific selling profile to correct for seasonal selling effects.
7. (Previously presented) The method of claim 6, wherein the adjusting to correct for seasonal selling effects includes ratioing the retail location-product specific selling



profile with an aggregate profile that includes historical data for non-promoted products.

8. (Original) The method of claim 7, wherein the non-promoted products are non-seasonal or basic products.

9. (Original) The method of claim 7, wherein the non-promoted products are seasonal products.

10. (Previously presented) The method of claim 1, further including adjusting the retail location-product specific selling profile to correct for special selling days which impacted the historical data.

11. (Original) The method of claim 10, wherein the special selling days include one or more days preceding Valentines Day, Mothers Day, Memorial Day, the Fourth of July, Labor Day, Thanksgiving or Christmas.

12. (Original) The method of claim 10, wherein the special selling days include one or more days following Thanksgiving or Christmas.

13. (Original) The method of claim 10, wherein the special selling days include back to school days.

14. –15. (Cancelled)

16. (Previously presented) The method of claim 1, wherein the daily or more frequent historical data includes a stock on hand indicator, further including adjusting the historical data to correct for a stock out at the retail location .

17. (Previously presented) The method of claim 16, wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand

indicators for the location and correcting for lack of sales attributable to failure to display stock on hand.

18. (Previously presented) The method of claim 16, wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand indicator for the location and filling in sales for days preceding first dates of sales for the location.

19. (Previously presented) The method of claim 16, wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand indicator for the location and correcting for outlying sales at the location attributable to false indications of stock on hand.

20. (Previously presented) The method of claim 16, wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand indicator for the location and filling in sales for days following final dates of sales, after excluding outlying sales at the locations.

21. (Previously presented) The method of claim 3, wherein the daily or more frequent historical data includes a stock on hand indicator, further including adjusting the historical data to correct for a stock out at the retail locations.

22. (Previously presented) The method of claim 4, wherein the daily or more frequent historical data includes a stock on hand indicator, further including adjusting the historical data to correct for a stock out at the retail locations.

23. (Previously presented) The method of claim 5, wherein the daily or more frequent historical data includes a stock on hand indicator, further including adjusting the historical data to correct for a stock out at the retail locations.

24. (Cancelled)

25. (Previously presented) A computer-implemented method for adjusting a retail location-product specific selling profile for a product, the computer-implemented method including:

retrieving at least one retail location-product specific selling profile that includes accumulated daily or more frequent historical data for at least one product;

wherein the historical data includes a stock on hand indicator , adjusting the retail location-product specific selling profile to correct for a stock out .

26. (Previously presented) The method of claim 25, wherein the adjusting to correct for the stock out includes evaluating the historical data and the stock on hand indicator and correcting for lack of sales attributable to failure to display stock on hand.

27. (Previously presented) The method of claim 25, wherein the adjusting to correct for the stock out includes evaluating the historical data and the stock on hand indicator and filling in sales for days preceding first dates of sales for the locations.

28. (Previously presented) The method of claim 25, wherein the adjusting to correct for stock out conditions includes evaluating the historical data and the stock on hand indicator and correcting for outlying sales at the locations attributable to false indications of stock on hand.

29. (Previously presented) The method of claim 25, wherein the adjusting to correct for the stock out includes evaluating the historical sales data and the stock on hand indicators for the locations and filling in sales for days following final dates of sales, after excluding outlying sales at the locations.

30. (Previously presented) The method of claim 25, wherein the stock out is corrected using average sales levels.

31. (Previously presented) The method of claim 25, wherein the stock out is corrected using profiled sales levels.

32. (Original) The method of claim 25, wherein a selection among types of out of stock corrections requires no user selection.

33. (Original) The method of claim 25, wherein a selection among types of out of stock corrections is made by a user.

34.-64. (Cancelled)

65. (Previously presented) A computer-implemented method for generating a projected location specific-retail sales profile for a particular product, the computer-implemented method including:

accessing at least one adjusted or unadjusted location specific-retail selling profile that includes accumulated daily or more frequent historical data for at least one product; and

projecting a future sales profile by adjusting the location specific-retail selling profile to reflect sales lift from one or more promotions planned for the product.

66. (Previously presented) The method of claim 65, further including storing the projected sales profile for the product.

67. (Previously presented) The method of claim 65, wherein the product has a time period for sales, further including truncating the location specific-retail selling profile to a time period the same length as the time period for sales.

68. (Previously presented) The method of claim 67, further including scaling historical data for the truncated location specific-retail selling profile so that the scaled sales profile projections sum to 1.0.

69. (Previously presented) The method of claim 65, wherein the promotions have starting dates and ending dates and the starting dates and the ending dates are used in adjusting the location specific-retail selling profile.

70. (Previously presented) The method of claim 65, wherein the promotions include advertising of the product.

71. (Previously presented) The method of claim 69, wherein the promotions include advertising of the product.

72. (Previously presented) The method of claim 65, wherein the promotions include a preferred display of the product.

73. (Previously presented) The method of claim 69, wherein the promotions include a preferred display of the product.

74. (Previously presented) The method of claim 65, wherein the promotions include a reduced price for the product.

75. (Previously presented) The method of claim 69, wherein the promotions include a reduced price for the product.

76. (Previously presented) A computer-implemented method of revising a plurality of retail location distribution shares for a particular product, taking into account planned promotions of the particular product, the computer-implemented method including :

accessing a plurality of projected sales profiles, by retail location, for a particular product;

adjusting the projected sales profiles to reflect sales lift from one or more promotions planned, by retail location, for the particular product;

revising a plurality of location distribution shares based on the adjusted projected sales profiles.

77. (Original) The method of claim 76, wherein the promotions include advertising of the particular product.

78. (Original) The method of claim 76, wherein the promotions include a preferred display of the particular product.

79. (Original) The method of claim 76, wherein the promotions include a reduced price of the particular product.

80. (Previously presented) A computer-implemented method of revising a plurality of location distribution shares for a particular product, taking into account planned promotions of the particular product, the computer-implemented method including :

accessing a plurality of projected daily or more frequent sales profiles, by retail location, and a plurality of retail location distribution shares, for a particular product; and

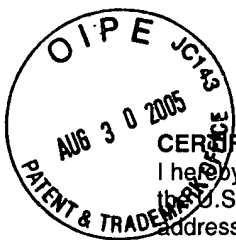
adjusting the retail location distribution shares to reflect a weighted mix of the projected daily or more frequent sales profiles and an actual daily or more frequent sales.

81. (Original) The method of claim 80, wherein the actual daily or more frequent sales are for a group of products.

82. (Original) The method of claim 80, wherein the weighted mix is calculated using  $\text{weight} = [(\text{actual sales} / \text{projected sales}) * (1 - \text{factor})] + (\text{factor})$ .

83. (Original) The method of claim 82, wherein the factor selected is between 0.0 and 1.0.

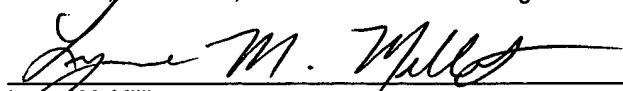
84. (Original) The method of claim 80, wherein the weighted mix is calculated proportional to an elapsed period of sales.



Atty Docket No. BLFR 1000-1

**CERTIFICATE OF MAILING**

I hereby certify that this correspondence is being deposited with the U.S. Postal Service for First-Class Mail delivery, postage prepaid, addressed to: Mail Stop Appeals, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450 on 26 August 2005.

  
Lynne M. Milliot

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re Application of:

Robert E. DVORAK

Application No. 09/708,944

Confirmation No. 3032

Filed: 08 November 2000

Title: **METHOD AND APPARATUS FOR  
DISTRIBUTION OF FASHION AND  
SEASONAL GOODS**

Group Art Unit: 3623

Examiner: Romain JEANTY

**CUSTOMER NO. 22470**

MAIL STOP - APPEALS  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

**TRANSMITTAL OF APPEAL BRIEF**

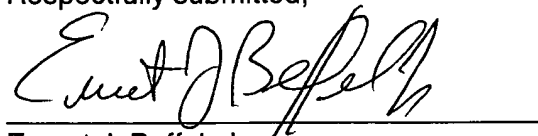
Sir:

In connection with the above-referenced U.S. patent application, transmitted herewith are the following document(s):

- ☒ **Appeal Brief**
- ☒ **Check No. 3415** in payment of the filing fee for an Appeal Brief (\$500)

The Examiner is hereby authorized to charge Deposit Account No. 50-0869 (BLFR 1000-1) for any deficit or overpayment of any fees associated with this document.

Respectfully submitted,



Ernest J. Beffel, Jr.  
Registration. No. 43,489

Dated: 26 August 2005

HAYNES BEFFEL & WOLFELD LLP  
P.O. Box 366  
Half Moon Bay, CA 94019  
Telephone: (650) 712-0340  
Facsimile: (650) 712-0263